IN THE SUPREME COURT OF FLORIDA

FILED
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CLERK, SUPREME COURT
By
Deputy Clerk

ULRECK OMELUS,

Appellant,

v. CASE NO. 73,9[illegible]

STATE OF FLORIDA,

Appellee/Cross Appellant.
_____/

ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS APPELLANT

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SUMMARY OF ARGUMENT

POINT I: The trial court did not abuse its discretion in denying the motion for judgment of acquittal where the evidence presented was sufficient to prove Omelus hired, aided, abetted and procured John Henry Jones to murder Willie Mitchell. The fact that Omelus may not have known which weapon was to be used in the murder does not render the indictment deficient. The indictment advised Omelus of the charges pending against him.

POINT II: The trial court did not abuse its discretion in denying a mistrial motion based on prosecutorial misconduct regarding a comment made in opening statement and a question asked a state witness. The comment and question were equivocal and not an intentional breach of the trial court's ruling. Error, if any, was harmless.

POINT III: The instruction the trial court gave on heinous, atrocious or cruel, is not unconstitutionally vague. Whether the trial court erred in instructing on the aggravating factor of heinous, atrocious, and cruel was not preserved for review. The instruction was appropriate and supported by the evidence. The judge is the ultimate sentencing authority. The fact that the judge rejected an aggravating factor did not prejudice Omelus. Any error in instructing the jury on a factor which was ultimately rejected is harmless.

POINT IV: The trial court did not err in rejecting Omelus' proposed jury instruction listing certain non-statutory mitigating factors. The standard jury instructions correctly apprise the jury of the law governing penalty phase deliberations.

POINT V: The standard jury instruction that the aggravating factors must outweigh the mitigating factors does not improperly shift the burden to a defendant. The standard jury instruction has been repeatedly upheld.

POINT VI: Omelus' constitutional attack on the death penalty was not preserved for review, and there had been no showing of fundamental error.

POINT VII: The trial court did not abuse its discretion in restricting cross-examination of state witnesses where the testimony was either collateral, irrelevant, or had previously been asked and answered.

POINT VIII: The trial court properly applied Florida's capital sentencing statute in considering the non-statutory mitigating factors presented by Omelus. After considering the aggravating and mitigating factors, the trial court correctly determined that the murder was committed in a cold, calculated and premeditated manner, and was committed for pecuniary gain. The trial court found that the two statutory factors outweighed the one mitigating factor: that the co-defendant received a life sentence. The death penalty as applied to Omelus is proportionate. Whether the prosecutor made improper remarks in sentencing was not preserved for review, nor were the comments improper or prejudicial.

POINT XI: Omelus' challenge to appellate review procedures applied by this court in death cases has not been preserved for review and is, in any event, without merit.

POINT X: The issue whether certain exhibits which pertained to another murder case were viewed by the jury is not properly before this court. Omelus has not demonstrated that the jury was actually exposed to any evidence which was not properly introduced.

POINTS I, 1V, AND V ON CROSS APPEAL: The trial court should have allowed testimony regarding a similar murder which Omelus hired Jones to do eight weeks weeks before this murder. The facts were similar, and relevant to prove plan, motive, preparation, identity, and relationship between Jones and Omelus. Even if the entire testimony were not allowed, the limited testimony regarding Omelus hiring Jones to do several murders, and the limited testimony regarding obtaining a gun should have been allowed.

POINT II ON CROSS APPEAL: The trial court should have applied the aggravating factor of heinous, atrocious, or cruel to this murder. The circumstances surrounding the murder support this finding, and Omelus is responsible for the acts of Jones.

POINT III ON CROSS APPEAL: The trial court should not have granted Omelus' request for a jury instruction advising the jury that if there were no parole function, Omelus would not be eligible for parole in twenty-five years, but would be sentenced to life. Recent case law holds that parole is still viable for capital felons.

ARGUMENT

POINT I

THE INDICTMENT WAS SUFFICIENTLY SPECIFIC TO ADVISE OMELUS OF THE CHARGES AGAINST HIM, AND THE TRIAL COURT PROPERLY DENIED OMELUS' MOTION FOR JUDGMENT OF ACQUITTAL.

After the state rested, Omelus moved for a judgment of acquittal on one ground as follows:

> The allegation which the state has to prove is that which is alleged in the document. And if you look in the Indictment, they allege that on or between October 19, 1986, and October 31, 1986, in the County of Brevard Mr. Omelus did then and there aid, abet, counsel, hire or otherwise procure another, John Henry Jones, to commit a criminal offense against the State of Florida, to wit: first degree murder from a premeditated design to unlawfully kill a human being, Willie Mitchell.
>
> Here's the other language. Goes on to say "by stabbing Willie Mitchell with a knife or other sharp instrument."
>
> I think if you look at the evidence it's quite clear that at no time did Mr. Omelus ever ask Mr.(sic), ever aid, procure, hire or abet Mr. Jones to kill Mr. Mitchell by stabbing him with a sharp instrument.
>
> I don't have any specific case law to cite for the Court, but I believe the law in the State of Florida is when the State of Florida makes an allegation in the Indictment, that's the document that it intends to rely on to charge a Defendant with an offense. And it alleges an event occurred in a specific matter, i.e., Mr. Omelus hired Mr. Jones to stab Mr. Mitchell to death. They're required to prove that.
>
> The evidence is quite clear at no time did Mr. Omelus ever talk to Mr. Jones

> about killing Willie Mitchell with a knife or a sharp instrument and stabbing him to death (R1549-1550).

The defense rested without presenting evidence or testimony, and the motion for judgment of acquittal was renewed on the grounds previously stated (R1557).

Omelus argues that since the state charged Omelus with hiring Mr. Jones to commit a criminal offense, to-wit: first degree murder of Willie Mitchell by stabbing him with a knife or other sharp instrument, the state must prove that Omelus knew Mr. Jones would use a knife in the murder. Fla. R. Crim. P. 3.140(o) provides that an indictment shall not be dismissed on account of any defect in the form of the indictment unless the court shall be of the opinion that the indictment is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense. Omelus never argued that he was prejudiced in any way, or that he was mislead or embarrassed in the preparation of his defense. Although he argues on appeal that the state preserved the right to retry him in a way other than by stabbing, this issue was not raised below. The issue is not preserved for review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Omelus did not make a pre-trial motion to dismiss the indictment. Fla. R. Crim. P. 3.190(b) provides:

> All defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss the indictment or information whether the same shall relate to matters of form,

> substance, former acquittal, former jeopardy, or any other defense.

Fla. R. Crim. P. 3.190(c) requires that a motion to dismiss the indictment be made before or upon arraignment unless the court permits the defendant to file the motion at a time set by the court. Rule 3.190(c) also provides that if a motion to dismiss is not presented within the time limits imposed, it is waived unless the objection is fundamental.

In Jones v. State, 415 So.2d 852, 853 (Fla. 5th DCA 1982), the court held that "where the information is merely imperfect or imprecise, the failure to timely file a motion to dismiss under Rule 3.190(c) waives the defect and it cannot be raised for the first time on appeal".[1] In Asmer v. State, 416 So.2d 485,487 (Fla. 4th DCA 1982), the court held:

> Rule 3.190(b) Florida Rules of Criminal Procedure requires all defenses other than that of not guilty to be made only by motion to dismiss the information. Failure to so raise the defense waives the defect, unless the information wholly fails to charge a crime, *Tracey v. State*, 130 So.2d 605 (Fla. 1961), *State v. Taylor*, 283 So.2d 882 (Fla. 4th DCA 1973). Failure to allege one ingredient of an offense does not necessarily render the charge void as a wholly failing to state a crime, *State v. Taylor*, *supra*, particularly where the information charges the specific section of the statute under which the prosecution proceeds. *Haselden v. State*, 386 So.2d 623 (Fla. 4th DCA 1980), *Kiddy v. State*, 378

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[1] Should this issue or any others be found to be procedurally barred, it is respectfully requested that the opinion of this court contain a plain statement to that effect in order to avoid potential relitigation of the issues(s) in federal collateral proceedings. See, Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1032 L.Ed.2d 308 (1989).

> So.2d 1332 (Fla. 4th DCA 1980), *Bass v. State*, 263 So.2d 611 (Fla. 4th DCA 1972).
>
> The principles reviewed herein have enjoyed long standing and consistent application by the courts of this State. A defendant may not thwart the ends of justice by sitting on a technical defect which has occasioned him no prejudice, holding it in reserve as a trap to spring on the State in the event the jury renders an adverse verdict.

A substantive defect in an indictment or information may be waived unless challenged timely by a motion to dismiss. Tucker v. Florida, 417 So.2d 1006, 1009 (Fla. 3rd DCA 1982). In Tucker, the appellate court certified the question whether failure to specify venue was so fundamental it could be reviewed on appeal, even though not properly presented to the trial court, where the defendant was not hindered in the preparation or presentation of his defense. This court answered the question in the negative after reviewing existing caselaw. Tucker v. State, 459 So.2d 306 (Fla. 1984). This court held that failure to allege venue was an error of form, not of substance, and the defect would not render the charging instrument void absent a showing of prejudice to the defendant. The alleged defect in the present case is merely one of form, and Omelus was not prejudiced in any way by the wording of the indictment.

Addressing the merits, there was no variance between the allegation and the proof at trial. The allegation was that Omelus hired Jones to murder Willie Mitchell, which was proved at trial. Omelus suggests that because the state added the language "by stabbing Willie Mitchell with a knife", the state then had to

prove that Omelus knew the weapon to be used and had to specifically hire Jones to kill Mitchell with a knife. This is a question of semantics, and Omelus attempts to elevate form over substance. The fact remains that Omelus was not misled in the preparation of his defense, or subjected to the possibility of reprosecution for the same offense, nor has Omelus alleged same. Any minor semantical defect is immaterial. See Grissom v. State, 405 So.2d 291 (Fla. 1st DCA 1981); Marshall v. State, 381 So.2d 276 (Fla. 5th DCA 1980); Sharp v. State, 328 So.2d 503 (Fla. 3d DCA 1976).

The state proved that Omelus hired Jones to murder Mitchell and that the murder was committed by stabbing with a knife. There was sufficient evidence that Omelus hired Jones to kill Mitchell to submit the case to the jury. Omelus was on notice of the elements of the offense. Proof of knowledge of the exact instrument to be used in the murder is not an element of principal to first degree murder. § 782.04 Fla. Stat. (1987), § 777.011, Fla. Stat. (1987).

The cases cited by Omelus are distinguishable because in those cases the state failed to prove what was charged. In Booker v. State, 93 Fla. 211, 111 So.476 (1927), the indictment alleged that the defendant broke and entered a smokehouse; however, the state presented no evidence to prove that building or a fowlhouse was entered by a breaking. The court observed that although the state may have been able to prove entry without breaking into the fowlhouse, there was not sufficient evidence to prove breaking and entering into the smokehouse as charged.

Unlike Booker, the state in this case charged murder of Willie Mitchell by Jones with a knife, which was proved beyond a reasonable doubt.

Omelus also cites Barker v. State 78 Fla. 477, 83 So. 287, 289 (1919). In Barker, the court found that the instrument offered into evidence in a forgery case was "materially and essentially" different from the instrument set out in the indictment. In Ankiel v. State, 479 So.2d 263 (Fla. 5th DCA 1975), the information charged trafficking in more than 400 grams of cocaine, but the evidence only supported a conviction of possession of more than 200 grams. In Jones v. State, 325 So.2d 436 (Fla. 1st DCA 1975), the defendant was charged with possessing a pistol, but the evidence was insufficient to prove conscious and substantial possession. In Jiminez v. State, 231 So.2d 26 (Fla. 3d DCA 1970), the state charged the defendant with possession of heroin, but the evidence showed the substance was morphine. In the present case, the state proved exactly what was charged: that Omelus hired Jones to murder Willie Mitchell, and the murder was accomplished with a knife.

The trial court should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury might lawfully take favorable to the opposite party can be sustained under the law. Heiney v. State, 447 So.2d 210 (Fla. 1984); Lynch v. State, 293 So.2d 44 (Fla. 1974). When the defendant moves for judgment of acquittal, he admits all facts in evidence as well as all inferences from that evidence favorable to the state. Busch v. State, 466 So.2d 1075 (Fla. 3rd DCA

1984). The motion for judgment of acquittal was properly denied because any defect in the information was minimal and error, if any, was harmless. Omelus' rights were not substantially affected, and this court cannot presume his rights were injured. § 924.33, Fla. Stat. (1987). By not moving timely to dismiss the information, the objection was waived.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING OMELUS' MOTIONS FOR MISTRIAL WHERE THE PROSECUTOR'S COMMENT AND QUESTION WERE INOFFENSIVE AND HARMLESS.

A motion for mistrial should be granted only in cases of absolute necessity and where the error asserted is so egregious as to vitiate the entire trial. Cobb v. State, 376 So.2d 230, 232 (Fla. 1979), State v. Murray, 443, So.2d 955 (1984). The trial court did not abuse its discretion in denying the motion for mistrial. Johnston v. State, 497 So.2d 863 (Fla. 1986); Salvatore v. State, 366 So.2d 745, 750 (Fla. 1979).

Omelus complains of two instances in which the he says the prosecutor alluded to evidence concerning another murder in which Omelus allegedly was involved. The first instance was during opening statement where the prosecutor talked about Omelus and Jones going to Wabasso to purchase a gun, after which Omelus showed Jones the man he wanted killed (R589). Omelus moved for mistrial (R 589). He did not Object to the statement for a curative instruction . This error was waived. Ferguson v . State, 417 So.2d 639 (Fla. 1982). .

Viewed in context of the evidence presented, the jury would not have known there was a second murder unless they had prior knowledge and could distinguish minor factual variations in the two murders. In both murders, Omelus drove Jones to the murder site and in both murders, a weapon was sought beforehand. As the judge observed, the statement was neutral, and he denied the motion for mistrial (R592). Omelus now argues that the trial

court did not appreciate that the prosecutor was talking about the other murder because he was unfamiliar with the evidence (Initial brief at 35). Yet Omelus would have this court believe that the jury would appreciate this comment as alluding to the other murder in Indian River when they had absolutely no knowledge of that murder. The facts of this case show that Omelus and Jones did pick Mitchell up in Gifford or Wabasso the night of the murder, and Omelus told Jones he was the victim (R 992). Jones had seen Crayton and Dugger to obtain a gun and had obtained a weapon (R 999-100). Error, if any, was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)

The second incident was a question the prosecutor asked John Henry Jones regarding whether Omelus had hired him to commit one murder or whether he was "thinking about others" (R841). The prosecutor did not refer directly to any other murder that was committed, but merely was establishing the relationship between Omelus and Jones. Although Omelus argues that this was an intentional effort to put the other murder in front of the jury, the prosecutor specifically stated that it was not his intention to bring forth any evidence that a murder was actually committed but was trying to establish the relationship between Jones and Omelus (R847). The relationship between a state witness and defendant is relevant and admissible. Dufour v. State, 495 So.2d 154, 159 (Fla. 1986). The trial court gave a curative instruction (R968). The instruction cured any alleged error by informing the jury what the prosecutor said was not evidence. The record does

not demonstrate a continued problem which indicates the curative instruction was effective. See Johnston v. State, supra.

Omelus contributed to any alleged knowledge the jury might have received about the Indian River murder. During cross-examination of Jones, defense counsel asked him whether he would do "whatever" to collect money for Omelus (R1058). Defense counsel referred to "collections" and "collection work" (R1059, 1064). Counsel even stated "now, this meeting about a murder comes up, potential murders, he's going to hire you as a contract killer, in effect, right" (R1066). Any error in the prosecutor asking about more than one murder was harmless where defense counsel repeatedly questioned Jones on the same subject.

The jury was never aware of the Indian River murder, so their point of reference for the events described could only be considered as probative of the Mitchell murder. There was no testimony that on one of the trips to Indian River County, Dessamma Cherry was murdered, only that there were trips to Indian River because Mitchell resided there and Jones went there to obtain a weapon (R975, 992-994). Any alleged reference to the Indian River murder is speculative.

Omelus contends the above instances constituted prosecutorial misconduct. There was no misconduct, and even if there were, prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are "so basic to a fair trial that they can never be treated as harmless". State v. Murray, supra. Omelus has cited two minor instances in a trial which occurred over a period of ten days and 1725 pages of transcript.

Although Omelus argues that the above error was significant because Jones' testimony was not credible, it is well settled that credibility issues are for the jury to determine. Jones' testimony was corroborated by state's witnesses Lottie Baker, Willie Smith, Bernard Knight, Irving Cartwright and Gerald Crayton. This court will not reverse a judgement based upon a verdict returned by a jury where there is substantial competent evidence to support the jury verdict. Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981). This issue may have been appropriate if raised in a motion for judgment of acquittal, but it is not appropriate in this context.

POINT III

THE INSTRUCTION ON HEINOUS, ATROCIOUS, OR CRUEL IS NOT UNCONSTITUTIONALLY VAGUE, AND THE TRIAL COURT PROPERLY INSTRUCTED THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL, EVEN THOUGH HE DID NOT CITE THAT AS AN AGGRAVATING FACTOR IN HIS SENTENCING ORDER.

Omelus argues that the instruction the trial court gave on heinous, atrocious and cruel ("HAC") was unconstitutionally vague, inapplicable as a matter of law, and erroneously considered by the jury in their deliberations.

Defense counsel filed a motion to strike the HAC instruction because it was vague and overbroad (R1754, 2051-52); but when the instruction was given, he did not specifically object to the instruction on the ground it was inapplicable to this case. In fact, in his requested jury instruction filed July 14, 1988, Omelus requested that all aggravating circumstances be read to the jury "in order to give a complete picture as to what types of cases may be aggravated and in order to not leave the impression that all aggravating circumstances that exist are proven against the Defendant" (R2026).

The trial court modified the standard instruction to incorporate a Dixon definition of this aggravating factor as follows:

> "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile, and "cruel" means designed to inflict a high degree of pain with utter indifference to or, even enjoyment of, the suffering of others.

> With regard to this aggravating circumstance, what is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set this crime apart from the norm of capital felonies, the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

(R 1921). After the instructions were given, the trial court asked if there were any objections except as previously noted or any additional instructions (R1926). Omelus said there were not.

To preserve an issue for appellate review, the specific ground for the objection must be given. Tillman v. State, 471 So.2d 32 (Fla. 1985). The only previous objection to the HAC instruction was on the basis of vagueness. Defense counsel never objected to the giving of the HAC instruction on the basis the instruction was not supported by the evidence. In fact, before closing argument the state attorney indicated he would argue HAC (R1882). Defense counsel did not object to the state arguing HAC. After HAC was argued by the state attorney, defense counsel had the opportunity to rebut the argument (R1896, 1898, 1905-1908). The argument Omelus now raises on appeal was waived. Castor v. State, 365 So.2d 701 (Fla. 1978).

As Omelus observes, instruction on an aggravating factor should be given where supported by the evidence. Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985); Roman v. State, 475 So.2d 1228, 1234 (Fla. 1985). In Lara, the trial court followed the standard jury instructions and addressed all circumstances, giving instructions for those aggravating and mitigating circumstances

for which evidence had been presented. This was the proper procedure. In the present case, the state presented testimony on the manner of death from Dr. Reeves, who was cross-examined by defense counsel (R1769-1821).

Under the circumstances of this case, the HAC instruction was supported by the evidence where the victim died as a result of multiple stab wounds, had defensive wounds on his hands, knew of his impending death, and did not die immediately but dragged himself at least 10 feet into some bushes. This court has upheld the HAC factor in cases similar to this. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) (several of thirty or more stab wounds were defensive wounds); Duest v. State, 462 SO.2d 446 (Fla. 1985) (eleven stab wounds and victim lived for minutes before dying); Lusk v. State, 446 So.2d 1038 (Fla. 1984) (three stab wounds and victim bled to death); White v. State, 415 So.2d 719, fn.2h (1982) (fourteen puncture wounds and slit throat); Morgan v. State, 415 So.2d 6 (Fla. 1982) (death caused by one of ten stab wounds). As indicated by the victim's statement that "I'll pay you" before he was killed, he was aware of his impending death (R1078). This court has upheld the HAC factor when there was fear and emotional strain caused by impending death. Garcia v. State, 492 So.2d 360 (Fla. 1986); Francois v. State, 407 So.2d 885 (Fla. 1981); Adams v. State, 412 So.2d 850 (Fla. 1982); Knight v. State, 338 So.2d 201 (Fla. 1976).

Even if the instruction were erroneously given, the result of the weighing process would not be different even without this single aggravating factor. See, Dufour v. State, 495 So.2d 154

(Fla. 1986); Lusk v. State, 446 So.2d 1038 (Fla. 1984). Reversal is not required when an erroneous finding of an aggravaing circumstance is harmless because of the existence of other aggravating factors. Barclay v. Florida, 463 U.S. 939, 956-958 (1983), Zant v. Stephens, 462 U.S. 862, 879-80 (1983). So even if the jury considered an erroneous factor, the existence of two other aggravating factors renders it harmless. Although the jury's recommendation of life or death is given deference, the trial court makes the ultimate determination as to sentence and must itself consider which aggravating and mitigating factors apply, what weight should be accorded to each, and how they balance. Lopez v. State, 536 So.2d 226 (Fla. 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988).

This court has already rejected Omelus' vagueness challenge to the aggravating factor set forth in S. 921.141(5)(h), Fla. Stat. (1987) in Smalley v. State, 546 So.2d 720 (Fla. 1989). The Smalley court held that the "especially heinous, atrocious or cruel" aggravating factor was given a more precise meaning in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), and with this narrowed construction, was upheld against a vagueness challenge in Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L.Ed.2d 913 (1976). As such, Omelus has no standing to attack the constitutionality of the standard instruction on HAC.

Omelus' argument based on Maynard v. Cartwright, 486 U.S. ___, 108 S. Ct. 1853, 100 L.Ed.2d 372 (1988) is misplaced since Maynard dealt with Oklahoma's death penalty system where the jury is the ultimate sentencing authority. The court in Cartwright v.

Maynard, 822 F.2d 1477, 1482 (10th Cir. 1987), noted that Oklahoma had "no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance." Based on the holding of Godfrey v. Georgia, 466 U.S. 420,100 S. Ct. 1759, 64 L.Ed.2d 398 (1980), the Court of Appeals also concluded that the Oklahoma courts had not adopted a limiting construction that cured the inadequate and over-broad definition of the aggravating circumstance of HAC. 822 F.2d at 1497.

Nevertheless, after analyzing the Florida Supreme Court's narrowing construction of the statutory aggravating circumstance, the Court in Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L.Ed.2d (1976) stated, "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences". 428 U.S. at 256.

The facts of the instant case are a perfect illustration of how Florida's sentencing procedure overcomes any problem with the language of this aggravating circumstance. The trial court, as actual imposer of sentence, found that the circumstances surround the crime in this case did not call for the application of the HAC factor as it has been construed by this court. The trial court did not include this factor in its weighing process. Thus, any issue regarding the inapplicability of this aggravating factor to the case at bar is moot and no new penalty phase is necessary. Error, if any, was harmless beyond a reasonable doubt. State v. DiGuilio, supra.

Where the trial court properly found two aggravating factors and considered the mitigating circumstances, the death penalty should be affirmed.

POINT IV

THE TRIAL COURT PROPERLY REJECTED OMELUS' REQUEST THAT THE JURY BE INSTRUCTED ON NON-STATUTORY MITIGATING FACTORS BECAUSE THE STANDARD INSTRUCTIONS PROPERLY APPRISE THE JURY.

Omelus argues that the trial court refused his request to instruct the jury separately on the non-statutory mitigation factors that (1) defendant had been a model prisoner (2) defendant would conduct himself as a model prisoner in the future, and (3) defendant has the capacity for rehabilitation. Defense counsel filed a motion outlining these nonstatutory mitigating factors (R2051).

The trial court stated that the standard jury instruction covered the request, observing that the instructions allowed the jury to consider any other aspect of the defendant's character or record (R1809-10). As this court recently stated in Rivera v. State, 545 So.2d 864, 865 (Fla. 1989), Omelus' contention is "utterly without merit" where the trial court gave the standard jury instruction which instructed the jury it could consider any other aspect of the defendant's character or record and counsel discussed the non-statutory factors.

The standard of review is whether the trial court abused his discretion in refusing the requested instruction. King v. State, 514 So.2d 354 (Fla. 1987). When a requested instruction is subsumed in the standard instructions, it is not error to decline to give the defendant's request. Bertolotti v. State, 476 So.2d 130 (Fla. 1985). The trial court followed a long line of established precedent from this court that the standard jury

instructions adequately advise the jury that the statutory list of mitigating factors is not exhaustive. Mason v. State, 438 So.2d 374, 379 (Fla. 1983); Delap v. State, 440 So.2d 1242 (Fla. 1983); Kennedy v. State, 455 So.2d 351 (Fla. 1984); Mendyk v. State, 545 So.2d 846 (Fla. 1989). In Jackson v. State, 530 So.2d 269 (Fla. 1988) this court held that the standard instruction on mitigating circumstances complies with constitutional principles and that it was not error for the trial court to refuse to instruction the jury according to a written list of nonstatutory mitigating circumstances alleged by the defendant. Since Omelus presented evidence on the non-statutory mitigating factors and argued same to the jury, the jury was not precluded from weighing those factors. See Franklin v. Lynaugh, ___ U.S. ___, 108 S.Ct. 2320, 2322 (1988).

Even if it were error, it is harmless error. See Smith v. Dugger, 529 So.2d 679 (Fla. 1988); White v. Dugger, 523 So.2d 140 (Fla. 1988). Defense counsel presented evidence on the nonstatutory mitigating factors and argued the issue to the jury (R1823-1834, 1910-1012). The jury simply rejected the argument.

POINT V

THE TRIAL COURT CORRECTLY DENIED OMELUS' REQUESTED JURY INSTRUCTION REGARDING THE WEIGHT TO BE GIVEN AGGRAVATING AND MITIGATING FACTORS BECAUSE THE STANDARD INSTRUCTIONS SUFFICIENTLY APPRISE THE JURY.

Omelus' argument that the standard jury instructions shift the burden of proof to the defendant has been repeatedly dismissed. State v. Dixon , 283 So.2d 1 (Fla. 1975); Arango v. State, 411 So.2d 172, 174 (Fla. 1982); Preston v. State, 531 So.2d 154 (Fla. 1988); Stewart v. State, 549 So.2d 171 (Fla. 1989); Tafero v. Wainwright, 796 F.2d 1314 (11th Cir. 1986). In Arango, this court rejected the argument that the standard instructions misinformed the jury concerning the state's burden of proof as follows:

> A careful reading of the transcript (of the instructions), however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances. These standard jury instructions taken as a whole show that no reversible error was committed. Id. at 174.

Omelus has failed to demonstrate any compelling reason to revisit established precedent. Duest v. State, 462 So.2d 446 (Fla. 1985); Huff v. State, 495 So.2d 145 (Fla. 1986).

POINT VI

THIS CLAIM HAS NOT BEEN PRESERVED FOR APPEAL, AS THIS COURT HAS REPEATEDLY HELD THAT THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The alleged constitutional infirmities raised in this issue were not presented to, or ruled upon, by the trial court. This court has repeatedly held that absent an allegation and showing of fundamental error, an appellate court will not consider an issue unless it was first presented to the trial court. Grossman v. State, 525 So.2d 833 (Fla. 1988), Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Brown v. State, 381 So.2d 690 (Fla. 1980). Even alleged constitutional violations can be waived if not timely presented. See Trushin v. State, 425 So.2d 1126 (Fla. 1982); Ray v. State, 403 So.2d 956 (Fla. 1981).

In Grossman, this court noted that the appellant's various constitutional challenges to the capital sentencing statute had been raised in various motions to dismiss. In the instant case, there were no such motions or ruling by the trial court on the issue. Omelus' failure to raise these claims results in a procedural default which bars appellate review.[2]

This court has consistently held that the aggravating and mitigating circumstances enumerated in S. 921.141 (5) and (6) Fla. Stat. are not vague and provide meaningful restraints and guidelines for the exercise of discretion by the judge and jury.

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[2] Should this issue or any others be found to be procedurally barred, it is respectfully requested that the opinion of this court contain a plain statement to that effect in order to avoid potential relitigation of the issues(s) in federal collateral proceedings. See, Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1032 L.Ed.2d 308 (1989).

Lightbourne v. State, 438 So.2d 380, 390 (Fla. 1983); State v. Dixon , 283 So.2d 1 (Fla. 1973). The per se constitutionality of § 921.141, Fla. Stat. as well as the mechanics of its operation, have been consistently upheld despite numerous challenges. Proffitt v. Florida, 428 U.S. 242 (1976); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Alvord v. State, 322 So.2d 533 (Fla. 1975).

With respect to this court's opinions over the broad expanse of time, the state observes that it is the law in effect at the time an appeal is decided which controls. Dougan v. State, 470 So.2d 697 (Fla. 1985); Wheeler v. State, 344 So.2d 244 (Fla. 1977). As this court observed in Magill v. State, 428 So.2d 649, 651 (Fla. 1983):

> There can be no mechanical, litmus test established for determining whether . . . any aggravating factor is applicable. Instead the facts must be considered in light of prior cases addressing the issue and must be compared therewith and weighed in light thereof.

See also, Sullivan v. State, 441 So.2d 609, 613-614 (Fla. 1983).

Omelus' claims have been previously rejected by this court. Smith v. State, 457 So. 2d 1380 (Fla. 1984); Martin v. State, 455 So.2d 370 (Fla. 1984); Henry v. State, 377 So.2d 692 (Fla. 1979).

The United States Supreme Court has already determined that Florida's death penalty statute is facially constitutional is applied constitutionally. Proffitt v. Florida, 428 U.S. 242 (1976).

POINT VII

THIS ISSUE WAS NOT PRESERVED FOR REVIEW; NEITHER DID THE TRIAL COURT ABUSE ITS DISCRETION IN RESTRICTING CROSS EXAMINATION WHICH INVOLVED COLLATERAL ISSUES, WAS IRRELEVANT, OR THE QUESTION HAD BEEN PREVIOUSLY ASKED AND ANSWERED.

Omelus points to five instances in which cross examination was allegedly restricted. There was no proffer of the excluded testimony; therefore, this error has not been preserved for appellate review. Woodson v. State, 483 So.2d 858 (Fla. 5th DCA 1986); Salamy v. State, 509 So.2d 1201 (Fla. 1st DCA 1987); A.McD. v. State, 422 So.2d 336 (Fla. 3rd DCA 1982).[3]

The first instance Omelus complains about was whether Jones, the man Omelus hired to kill Willie Mitchell, had made accusations that another witness had hired someone to kill a person named Cookie. The trial judge properly based his ruling excluding the testimony on Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981).

Omelus claims he was also restricted in eliciting prior deals Jones had made with the state fourteen years before. Not only was this testimony not a part of this case as the judge ruled, but whether Jones made a deal in an unrelated offense fourteen years ago was totally irrelevant to this case and designed only to show Jones' bad character. See Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982); Pate v. State, 529 So.2d 328 (Fla. 2d DCA 1988). The issue was collateral, and once Jones said he did

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[3] Should this issue or any others be found to be procedurally barred, it is respectfully requested that the opinion of this court contain a plain statement to that effect in order to avoid potential relitigation of the issues(s) in federal collateral proceedings. See, Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1032 L.Ed.2d 308 (1989)

not get a lesser sentence because of a plea, there should have been no further questioning. Gelabert at 1009.

The trial court did not err in "preventing cross-examination from . . . becoming, under the guise of impeachment, a general attack on the character of the witness". Dufour v. State, 495 So.2d 154, 160 (Fla. 1986); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

The third instance involved another collateral impeachment matter. Defense counsel wanted to delve into Jones' prior "collections". The fourth instance was when the court sustained an objection to a question whether the insurance salesman had lied to law enforcement because he had not mentioned certain things in his statement to them. The prosecutor indicated that he would be willing to offer the statement in its entirety and that the salesman had never been asked about the statement. The fifth instance was when court sustained an "asked and answered" objection, which was entirely appropriate since the same issue had been discussed several times (R1473-1476).

A limitation on cross examination is not prejudicial where it merely serves to keep out irrelevant matters. Washington v. State, 432 So.2d 44 (Fla. 1983). § 90.612, Fla. Stat. (1987) provides that the judge shall exercise reasonable control over the mode and order of the interrogation of witnesses and presentation of evidence so as to facilitate discovery of the truth, avoid needless consumption of time and protect witnesses from harassment. The rule also provides that cross examination is limited to subject matter brought out on direct examination and to matters affecting credibility.

The trial court has broad discretion in the admission of evidence. Welty v. State, 402 So.2d 1159 (Fla. 1981); Demps v. State, 395 So.2d 501 (Fla. 1981). Unless an abuse of discretion can be shown, its ruling will not be disturbed. Hardwick v. State, 521 So.2d 1071 (Fla. 1988). Omelus was afforded ample opportunity to cross-examine each witness. He is not entitled to unlimited cross-examination in whatever way and to whatever extent the defense might wish. Kentucky v. Stincer, 482 U.S. 730, 107 S. Ct. 2658, 2664 (1987), quoting Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 295, 88 L.Ed. 2d 15 (1985). In Steinhorst v. State, 412 So.2d 332 (Fla. 1982), this court recognized that an accused has a constitutional right to full and fair cross-examination. However, that right is not unlimited. Questions on cross-examination must be related to credibility, or to matters brought out on direct examination. Steinhorst at 337.

Even assuming for the sake of argument that this ruling was error, it is harmless at best. In Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed. 2d 676 (1986), the Court held:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, areviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factor, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material

> points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. Cf. Harrington, 395 U.S. at 254, 89 S.Ct., at 1728; Schneble v. Florida, 405 U.S., at 432, 92 S. Ct., at 1059.

In the present case, none of the testimony excluded was important, defense counsel was allowed liberal cross-examination, and the points he wished to elicit would not have impacted on the verdict. If there were error, any error is harmless beyond and to the exclusion of any reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Omelus has not demonstrated the trial court abused his discretion in excluding the evidence. Smith v. State, 404 So.2d 167 (Fla. 1st DCA 1981).

POINT VIII

THE TRIAL COURT DID NOT ERR IN IMPOSING THE DEATH PENALTY WHERE HE PROPERLY DETERMINED AGGRAVATING AND MITIGATING CIRCUMSTANCES BASED ON THE EVIDENCE AND WEIGHED THOSE FACTORS PURSUANT TO THE STATUTE.

Although Omelus contends that the trial court did not consider the nonstatutory mitigating circumstances presented by Omelus, the trial court's order belies this contention by specifically discussing the mitigating factors. After the sentencing hearing, the jury rendered an advisory sentence of eight to four in favor of the death penalty (R2143). After the trial judge considered the advisory sentence, testimony, and memorandum of counsel, he entered the required findings of fact sentencing Omelus to death (R2196-2202).

The trial court found two aggravating circumstances and one mitigating circumstance. The aggravating circumstances were that the murder was committed in a cold, calculated and premeditated manner ("CCP"), and that it was committed for pecuniary gain (R2197). The mitigating circumstance was that Jones received a life sentence (R2199). The trial court rejected the other statutory and the nonstatutory mitigating factors after careful consideration, outlining his reason for rejecting each reason.

The trial court's conclusions are entirely correct. This court has said that the aggravating factor of CCP specifically applied to contract, execution, and witness elimination murders, even though this description is not all-inclusive. Stokes v. State, 548 So.2d 188, 197 (Fla. 1989); Routly v. State, 440

So.2d 1257 (Fla. 1983). Here, Omelus sought out Jones for the express purpose of killing Mitchell for the purpose of collecting $50,000 in insurance proceeds. Omelus offered to pay Jones $3,000, either in cash or cocaine, or both. In Rutherford v. State, 545 So.2d 855 (Fla. 1989), this court upheld a death sentence, stating that CCP is not limited to execution, contract, or witness elimination murders, but could be applied where a careful plan or prearranged design was present. In Rutherford, the murder was for pecuniary gain after weeks of planning. In the present case, Omelus acquired the insurance policy approximately three weeks before the murder. He began soliciting Jones to commit this murder and possibly others about four months prior to the actual killing, and went to find a weapon about two months prior.

Procuring a weapon beforehand supports the heightened premeditation required for CCP. See Lamb v. State, 532 So.2d 1051 (Fla. 1988); Huff v. State, 495 So.2d 145 (Fla. 1986); Davis v. State, 461 So.2d 67 (Fla. 1984); Eutzy v. State, 458 So.2d 755 (Fla. 1984). Additionally, Omelus actually picked up the victim and introduced him to Jones, driving them to a location near where the murder ultimately occurred. He gave them cocaine to sell and to smoke.

There is no question that the murder was committed for pecuniary gain since the purpose of the killing was to collect insurance proceeds. See Byrd v. State, 481 So.2d 468 (Fla. 1985) (husband killed wife for $100,000 insurance proceeds); Ziegler v. State, 402 So.2d 365 (Fla. 1981) (husband killed wife for

$500,000 insurance proceeds); Buenoano v. State, 527 So.2d 194 (Fla. 1988) (poisoned husband to receive life insurance proceeds and veterans benefits). There is no doubt that the testimony of the insurance salesman and Jones established that the purpose for the murder was for Omelus to collect the $50,000.00 insurance proceeds.

The courts have held numerous times that when valid aggravating circumstances exist, death is the appropriate penalty. See Peede v. State, 474 So.2d 808 (Fla. 1985); Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L.Ed. 2d 235 (1983).

The trial court's factual findings are clear and amply supported by the evidence. It is the judge's duty to resolve conflicts and his determination should be final. Martin v. State, 420 So.2d 583 (Fla. 1982); Lopez v. State, 536 So.2d 226 (Fla. 1988). Finding or not finding a specific mitigating circumstance applicable is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Stano v. State, 460 So.2d 890, 894 (Fla. 1984). The judge rejects mitigating factors as not factually supported by the record, and further finds that no other facts have mitigating value. See Rogers v. State, 511 So.2d 526, 534 (Fla. 1987).

The trial court has broad discretion in finding or not finding nonstatutory mitigating circumstances, so long as all the evidence was properly considered. Hargrave v. State, 366 So.2d 1 (Fla. 1979); Pope v. State, 441 So.2d 1073 (Fla. 1983); Porter v. State, 429 So.2d 293 (Fla. 1983); Floyd v. State, 497 So.2d 1211

(Fla. 1986). Omelus makes no contention that his presentation of mitigating evidence was restricted in any way.

Omelus has failed to establish an abuse of judicial discretion in the rejection of nonstatutory evidence. Smith v.State, 515 So.2d 182 (Fla. 1987). The trial court considered all the evidence presented, resolved conflicts in the evidence, and properly weighed the aggravating and mitigating circumstances in sentencing Omelus to death. The jury recommended death by a vote of eight to four; this is not a case in which the trial court overrode the jury's recommendation. It is not within this court's province to reweigh or reevaluate the evidence presented as to aggravating and mitigating circumstances. Hudson v. State, 538 So.2d 829, 832 (Fla. 1989).

Even if one or more aggravating circumstance was improperly found, the sentence of death should still be affirmed. Jackson v. State, 530 So.2d 269 (Fla. 1988); Dufour v. State, 495 So.2d 154 (Fla. 1986).

Omelus also argues that because Jones received a life sentence, Omelus should also receive a lesser sentence. This issue was argued to both judge and jury and was the one mitigating factor the judge did consider. This court has held that even though a co-defendant receives life, the death sentence can still be imposed on a defendant. Eutzy v. State, 458 So.2d 755 (Fla. 1984); White v. State, 415 So.2d 719 (Fla. 1982); Witt v. State, 342 So.2d 497 (Fla. 1977). This is particulary true when the defendant is the dominant force. Marek v. State, 492 So.2d 1055 (Fla. 1986); Tafero v. State, 403 So.2d 355 (Fla. 1981); Jackson v. State, 366 So.2d 752 (Fla. 1978).

In Goodwin v. State, 405 So.2d 170, 172 (Fla. 1981), a jury override case which was remanded for a life sentence, this court stated: "[we] do not intimate, however, that the presence of the defendant at the murder is always necessary for imposition of death".

As in Goodwin, the cases cited by Omelus involve a jury override situation which is far different from the present case where the jury recommended death. In a jury override situation, the judge's facts suggesting a sentence of death must be so clear and convincing that virtually no reasonable person could differ. See Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). In the present case, the jury recommended death by an eight to four vote, and after careful consideration of the aggravating and mitigating factors, memorandum of law, and a lengthy hearing on January 18, 1989, the court followed the jury's recommendation.

As the court stated in his written judgement and sentence:

> The real issue in this case is whether the nonstatutory mitigating circumstance of the actual perpetrator receiving a life sentence outweighs the aggravating circumstances previously specified. The death sentence has been approved when the circumstances indicate the defendant was the dominating force behind the homicide even though the defendant's accomplice received a life sentence for participation in the same crime. Marek v. State, 492 So.2d 1055 (Fla. 1986). There can be no doubt that the directive criminal force here was to obtain $50,000.00 in insurance money on the life of the victim. John Henry Jones had no independent reason to kill. With that directive criminal force, the defendant had a reason, though a perverse one, to hire John Henry Jones to kill the insured. To this extent

> that the only reason for the killing was supplied by this defendant and that but for the acts of obtaining insurance and hiring of John Henry Jones, there would have been no homicide - - it can be quite clearly said that the dominating force was the defendant and a sentence of death can be justified for the defendant even though John Henry Jones received a life sentence.

(R2200).

Omelus argues that the death sentence in this case is disproportionate because the "person who actually committed the murder did not receive the death penalty" (initial brief at 84). Omelus argues that Slater v. State, 316 So.2d 539 (Fla. 1975), should be considered by this court. The trial court was concerned about the Slater issue and requested memorandum on the issue (R1934). The memorandum were submitted and considered by the judge. In Omelus' memoranda, he recognized that since Slater, the Florida Supreme Court has been faced with numerous situations in which the defendant was sentence to death where a co-defendant received a life sentence (SR 1-6).[4] Omelus recognizes that Slater has been distinguished numerous times under different factual settings.

In Garcia v. State, 492 So.2d 360 (Fla. 1986), a similar argument was presented. The defendant complained that he received a death sentence while his accomplices received life sentences as a result of plea bargains. This court stated:

> Appellant's argument misapprehends the nature of proportionality review. Our proportionality review is a matter of

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4 "SR" refers to Supplemental Record filed January 8, 1990.

> state law. Pulley v. Harris, 465 U.S. 37, 104 S. Ct. 871, 79 L.Ed.2d 29 (1984); State v. Henry, 456 So.2d 466 (Fla. 1984). Such review compares the sentence of death to the cases in which we have approved or disapproved a sentence of death. It has not thus far been extended to cases where the death penalty was not imposed at the trial level. Proffitt v. Florida, 428 U.S. 242, 259 n.16, 96 S.Ct. 2960 n. 16, 49 L.Ed.2d 913 (1976); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Id. at 368.

The evidence at trial showed that Omelus sought after Jones to commit the murder. He provided him with cocaine. Omelus drove Jones to locate a weapon, and even picked up the victim and transported him to the place near where he would be murdered, instructing Jones that the person was the one he wanted killed. Jones had no reason to kill the victim and had never met him before that day. It was Omelus who was responsible for the murder and who was the motivating factor behind the event. See Marek, supra. The two aggravating factors were supported by competent substantial evidence and far outweighed the one mitigating factor. It is permissible for different sentences to be imposed on capital co-defendants whose culpability differs in degree. Hoffman v. State, 474 So.2d 1178 (Fla. 1985); Williamson v. State, 511 So.2d 289 (Fla. 1987).

The penalty imposed for this murder is proportional to other cases where this honorable court has upheld death sentences. Smith v. State, 365 So.2d 704 (Fla. 1978); Jackson v. State, 366 So.2d 752 (Fla. 1978); Antone v. State, 382 So.2d 1205 (Fla. 1980); Jacobs v. State, 396 So.2d 1113 (Fla. 1981); Brown v.

State, 473 So.2d 1260 (Fla. 1985); Hoffman v. State, 474 So.2d 1178 (Fla. 1985); Garcia v. State, 492 So.2d 360 (Fla. 1986); Craig v. State, 510 So.2d 857 (Fla. 1987); Diaz v. State, 513 So.2d 1045 (Fla. 1987); Thompson v. State, 14 FLW 527 (Fla. October 19, 1989).

In Smith, supra, the co-defendant plead to three murders and received concurrent life sentences in exchange for his testimony. This court distinguished Slater because the defendant's culpability was greater than the co-defendant's. In Jackson, supra, this court upheld a death sentence where the co-defendant received a life sentence because the defendant was the dominant factor. In the present case, Omelus was the more culpable party. In Antone, supra, the defendant orchestrated a contract murder for which he provided front money, a firearm, a picture of the victim, and drove the triggerman by the victim's house. The co-defendant made a plea bargain for a life sentence and agreed to testify against the defendant. This court distinguished Slater, saying that Antone was the "mastermind" of the operation. Antone supplied the gun, paid the money, and pressured the co-defendant to complete the task. Id. at 1208. In the present case, Omelus took Jones to look for a weapon, gave Jones cocaine and money for keeping his car, agreed to pay for the task, and let Jones know he should not cross him (R971, 975, 978, 986, 997, 1115).

Unlike Slater, the trial court in the present case did not have the discretion to sentence Jones to death since the state attorney had already made the decision not to seek the death

penalty on him. In Slater, the trial court had the discretion to sentence the more culpable co-defendant to death but did not do so. Another distinction is that the trial court found that Jones was dominated by Omelus, who was the catalyst (R220).

In Brown, supra, this court upheld a jury override and imposed the death sentence where a co-defendant received a life sentence. This court held that the evidence showed that Brown was the leader, and the co-defendant's plea, sentence, and agreement to testify for the state were the products of prosecutorial discretion and negotiation. Id. at 1268. In Hoffman, supra, the court again addressed Slater, and stated that disparate sentences are permissible where there are different degrees of participation and culpability among co-defendants. The prosecutorial discretion in granting immunity to one co-defendant does not render invalid the imposition of an otherwise appropriate death sentence. Hoffman at 1181, Garcia, supra, at 368.

In Craig, supra, the defendant shot one victim and ordered the other victim shot. He was sentenced to death in both murders even though the jury recommended life as to one. This court approved the jury override, finding that Craig was the planner and instigator of both murders and the co-defendant acted under his domination. As in Craig, Omelus was the "prime mover". See Craig at 870. In Diaz, supra, the evidence did not indicate who was the most culpable among co-defendants. The court ruled that prosecutorial discretion in making plea agreements with co-defendants does not violate the principle of proportionality.

In Thompson, supra, this court found that even though the judge overrode the jury's recommendation of life, the record reflected that Thompson was in charge and his accomplices were subordinates. The case involved a contract killing which Thompson put out on the life of a man who allegedly stole $600,000 from him. The only minor distinction from this case is that Thompson fired the fatal shot, where Omelus directly caused the killing to be done. However, another important distinction is that this court upheld the death sentence for Thompson even in a jury override situation.

The jury was aware of Jones life sentence, as was the judge who asked to be briefed on the recent caselaw. The jury and judge properly imposed the death penalty, which was proportionate under these circumstances.

Omelus also argues that the prosecutor mislead the jury by improper remarks during the penalty phase. The state first suggests that this argument is improper because it does not relate to the point raised on appeal. See Rodriguez v. State, 502 So.2d 18, 19 (Fla. 3d DCA 1986). The state next observes that none of the allegedly improper comments were objected to, nor was a curative instruction or mistrial requested (R1885, 1887-1891, 1896-1901). These arguments were waived. Clark v. State, 363 So.2d 331 (Fla. 1978); Lara v. State, 464 So.2d 1175 (Fla. 1985). Furthermore, none of the remarks were improper or harmful to Omelus.[5] Even if counsel had objected, the comments read in the context of the entire argument are not prejudicial error.

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[5] Should this issue or any others be found to be procedurally barred, it is respectfully

Omelus also argues that the jury recommendation should be given no weight. A jury's advisory opinion is entitled to great weight and should not be overruled unless no reasonable basis exists for the opinion. Grossman v. State, 525 So.2d 833 (Fla. 1988). Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983); Tedder v. State, 322 So.2d 908 (1975).

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requested that the opinion of this court contain a plain statement to that effect in order to avoid potential relitigation of the issues(s) in federal collateral proceedings. See, Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1032 L.Ed.2d 308 (1989)

POINT IX

OMELUS' ALLEGATION THAT THE APPELLATE REVIEW PROVIDED BY THE FLORIDA SUPREME COURT IS ARBITRARY AND CAPRICIOUS HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW: ALTERNATIVELY, THE CLAIM IS WITHOUT MERIT.

The specific constitutional challenge raised for the first time by Omelus was never presented to nor determined by the trial court to preserve the issue for appellate review. The clear procedural default in failing to contemporaneously raise this issue should be dispositive. Swafford v. State, 533 So.2d 270, 278 (Fla. 1988); Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984); Tillman v. State, 471 So.2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).[6]

Omelus' constitutional arguments have been rejected in Hildwin v. Florida, 490 U.S. ___, 109 S. Ct. 2055, 104 L.Ed.2d 728 (1989). Omelus presents no basis for invalidating Florida's death penalty statute on eighth amendment grounds where that statute has repeatedly survived constitutional challenge before this court and the United States Supreme Court. Barclay v. Florida, 463 U.S. 939, 103 S. Ct. 3418, 77 L.Ed.2d 1134 (1983); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976); Dixon v. State, 283 So.2d 1 (Fla. 1973). The United States Supreme Court in Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L.Ed. 2d 340 (1984), again specifically validated Florida's death penalty procedure including the jury override

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[6] Should this issue or any others be found to be procedurally barred, it is respectfully requested that the opinion of this court contain a plain statement to that effect in order to avoid potential relitigation of the issues(s) in federal collateral proceedings. See, Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1032 L.Ed.2d 308 (1989)

process and the standard of review applied by this court in Tedder v. State, 322 So.2d 908 (Fla. 1975).

The basic premise of Omelus' argument is incorrect: this court does not conduct a different analysis depending upon the jury's recommendation. In LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978), this court reviewed a case with a unanimous recommendation of death, and stated:

> The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation. Tedder v. State, 322 So.2d 908 (Fla. 1975).

The citation to Tedder demonstrates that the review process is the same regardless of the jury's recommendation. See also, Chambers v. State, 339 So.2d 204 (Fla. 1976); Cooper v. State, 336 So.2d 1133 (Fla. 1976).

Omelus' reliance upon the dissenting opinion in Burch v. State, 522 So.2d 810 (Fla. 1988), is misplaced. The import of Justice Shaw's dissenting opinion is that Florida's death penalty statute may be unconstitutional because it does not require fact-findings in the advisory jury recommendation but rather that the court should recede from the standard of review adopted in Tedder because it makes the jury recommendation "virtually determinative" and allows for "largely unfettered jury discretion" contrary to the intent of Florida's death penalty statute. Burch at 815. Established death penalty caselaw is that the trial judge makes findings of fact and is the ultimate

sentencer under Florida's death penalty scheme. For that reason the dissenters in Burch noted that the trial judge's fact findings, which were supported by competent substantial evidence, should not have been second-guessed by the majority of the court under the erroneously adopted Tedder standard. That minority opinion (shared by two justices) does not justify invalidating Florida's death penalty statue based upon Omelus' contrived analysis.

Omelus overlooks the fact that the jury's recommendation is advisory only. The sentencing determination is made by the trial court after reviewing the facts and considering the legal sentencing parameters established by this court. The judge incorporates the jury recommendation into his analysis, whether it be for death or life. See Grossman v. State, 525 So.2d 833, 839-840 (Fla. 1988). This court then supplies yet another level of review, analyzing the appropriateness of the sentencing judge's determination in light of the factual evidence presented, the established law, and an independent proportionality analysis. This court and the United States Supreme Court have made it clear that the various levels of review in our sentencing statute adequately serve to weed out arbitrariness and capriciousness in our death penalty system.

POINT X

THE ISSUE WHETHER INAPPROPRIATE MATERIALS WERE BEFORE THE JURY IS NOT REVIEWABLE BY THIS COURT, NOR WAS ANY ACTUAL ERROR DEMONSTRATED.

Omelus is precluded from raising this issue on direct appeal because it was not raised at the trial level before the exhibits went to the jury. It is the duty of counsel to insure that the exhibits are in order before they are sent to the jury. If defense counsel failed to insure that the exhibits were correct, he cannot now complain. He induced the error, and cannot now take advantage of any error, however speculative it may be. See Meek v. State, 474 So.2d 340 (Fla. 4th DCA 1985); Jackson v. State, 359 So.2d 1190 (Fla. 1978). By failing to preserve any error, Omelus waived that error. See White v. State, 348 So.2d 1170 (Fla. 3d DCA 1977); Ellison v. State, 349 So.2d 731 (Fla. 3dDCA 1977).

After the instructions, there was a discussion about the exhibits during which the court told a juror there would be items that had been lettered for identification that they could not take back with them. The court also stated that if there was a court exhibit, the jury would not receive that, either. The court also talked about a separate box that he had to put things in that would not go back to the jury (R1714). It can only be assumed that counsel and the court examined the exhibits and separated out the ones which had not been admitted before they were taken back into the jury room. Any objection to the exhibits should have been made by trial counsel at that time.

This issue was the subject of previous motions to relinquish jurisdiction and to contact jurors concerning exposure to exhibits filed by appellate counsel. Counsel first moved on June 30, 1989, for correction, clarification and supplementation of the record. On July 13, 1989, this court granted Omelus' motion for correction, clarification, and supplementation of the record on appeal. The record on appeal and exhibits were returned to the clerk of the circuit court of Brevard County with directions from this court to omit any exhibits that were not entered into evidence or marked as exhibits during the trial and hearings. On August 15, 1989, Omelus moved to contact jurors, which motion the circuit court denied on August 21, 1989. A second motion to contact jurors was filed in the Florida Supreme Court on September 21, 1989 and denied October 2, 1989. Omelus now asks this court to reconsider its ruling by way of direct appeal when the items complained of are not in the record. Appellate review should be confined to the record of the proceedings in the lower tribunal. Anderson v. State, 442 So.2d 397 (Fla. 5th DCA 1983); Johnson v. State, 418 So.2d 1063 (Fla. 3d DCA 1982).

Omelus has not demonstrated that the jury actually viewed any of the evidence and has not met the threshold burden of demonstrating that there was any possible error. Error cannot be presumed. See § 924.33, Fla. Stat. (1987).

There was no question from the jury regarding a photograph which did not correspond to this murder, nor was there any indication the jury had seen bullets, bullet casings, or projectile fragments. Surely either defense counsel or a jury

member would have noticed these items if they were actually taken into the jury room, since the present murder was a knifing and did not involve bullets.

Although the items Omelus complains of appear in the master index to this case as AN, OO, PP, SS, HHH, the index to the actual trial transcript does not show where these items were ever marked for identification in this trial. The trial index shows that AN was marked for a transcript of statement of Hagerman taken by Detective Leatherow which was admitted at R1498. The double and triple letters were not used in this trial. It is incumbent on Omelus to show that there was the possibility these exhibits were viewed by the jury. The more logical inference is that the exhibits which corresponded to the Indian River murder were inadvertently placed in the exhibits box for storage after the trial. In any event, any reason for the presence of the exhibits is pure speculation and conjecture, and not the basis to reverse a conviction.

POINT I ON CROSS APPEAL

THE TRIAL COURT SHOULD HAVE ALLOWED THE STATE TO PRESENT EVIDENCE OF THE EVENTS SURROUNDING THE DESSEMMA CHERRY MURDER WHERE THIS EVIDENCE WAS RELEVANT TO, AND INSEPARABLE FROM, THE PRESENT MURDER

As discussed in Point II on appeal, the trial court limited the testimony regarding the Dessamma Cherry murder which occurred in Indian River approximately eight weeks prior to this murder (R27-42). During the trial, the state proffered testimony of Jones regarding the Indian River murder (R854-923). Jones testified that when Omelus first approached him, he talked about doing three or four murders, but Jones did not know the names of the victims. One victim had broken into Omelus' room and taken drugs and money, another victim owed Omelus for dope, the third had stolen a car (R855). Omelus and Jones contacted Crayton and obtained a gun (R857-858). Omelus took Jones to Wabasso and showed him how to get to the house of a "Fitch" he wanted killed (R859-860). Omelus gave Jones money to buy drugs from Fitch, and they spent the night in a motel (R860).

Two days later, Omelus took Jones back to Wabasso where he instructed Jones to shoot the victim and wait in the woods (R862-863). Omelus had kept the gun and provided it to Jones before the murder. Omelus went up to the house to see if Fitch was home, then later let Jones out on the side of the road (864). Jones knocked on the door and shot Fitch then returned to the place where Omelus later picked him up (R865-866). Omelus told Jones he could make a lot of money if he stuck with him (R867). Jones was promised $3,000 in cocaine and money for the murder

(R868). He was paid some of the money and given cocaine. The Cherry murder was September 1, 1986 (R869). Four to five days later, Omelus gave Jones more money. (R870). Jones also did a favor for Omelus when he kept his car, for which he was paid (R874-877).

The state attorney argued that the Cherry murder was relevant, necessary, and material to the issue of who hired Jones to murder Mitchell (R906). The evidence also showed the motive - money, which was the same in both murders (R907). The state attorney also argued that it established the relationship between Jones and Omelus, which relationship Omelus denied (R909). The evidence was also relevant to identity as to who aided Jones (R910). The court focused on the similarity of facts "to the extent that the crimes were done in such a manner that one crime constitutes a fingerprint on the other crime" (R911). The court found that the evidence was unfairly prejudicial because there was no way to separate out the inference of bad propensity or bad character (R911).

Section 90.404(2)(a) Fla. Stat. (1987) provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Section 90.404(2)(b)(2) provides that the court can charge the jury on the limited purpose for which the evidence is

received. The state offered this evidence as relevant to the relationship, motive, and identity. It is also relevant to the plan and preparation, since the fact surrounding the two murders were similar. Omelus carried Jones to the site to kill a victim for monetary purpose. Jones did not know either victim. Omelusassisted in procuring the murder weapon in both cases. Omelus had a relationship of trust with both victims, renting Fitch, and providing housing to Mitchell. The price for each victim was $3,000. The fact that Fitch was shot and Mitchell stabbed is irrelevant, since Omelus intended that Mitchell be shot and tried to locate a gun (SR 5). Factually, the two events were similar. The court said they were not similar enough to be a "fingerprint". This court has recently held that evidence of other crimes is not limited to crimes with similar facts.

So-called similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence. The requirement that similar fact crimes contain similar facts to the charged crime is based on the requirement to show relevance. This does not bar the introduction of evidence of other crimes which are factually dissimilar to the charged crime if the evidence of other crimes is relevant. Bryan v. State, 533 So.2d 744, 746 (Fla. 1988). In Bryan, this court found that the only limitation placed on the rule of relevancy is that the state should not be permitted to make the evidence of other crimes the feature of the trial or to introduce the evidence solely for the purpose of showing bad character or propensity. This court also

observed that "[all] evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy". Id. at 747.

The state established the relevancy of the Indian River murder to the Mitchell murder. Furthermore, the events were so inextricably interwoven that they were inseparable. See Ehrhardt, Florida Evidence, Section 404.16 (2d Ed. 1984). The trial court should have allowed the state to introduce the evidence and given an instruction regarding the limited purpose for which it was admitted.

POINT II ON CROSS APPEAL

THE TRIAL COURT SHOULD HAVE FOUND THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS, OR CRUEL APPLIED TO THIS MURDER.

As discussed in Point III, this murder was similar to other murders in which this court has upheld the aggravating factor of heinous, atrocious and cruel ("HAC"). The trial court seemed concerned with the vicarious liability of Omelus for a murder which Jones committed when Omelus was not present. It is axiomatic that a principal is responsible for all acts of his accomplices and guilty of the same degree of crime whether or not he is actually present at the commission of the offense. See § 777.011 Fla. Stat. (1987); Potts v. State, 430 So.2d 900 (1982); Hampton v. State, 336 So.2d 378 (Fla. 1st DCA 1976); Miller v. State, 409 So.2d 109 (Fla. 3d DCA 1982); Coxwell v. State, 397 So.2d 335 (Fla. 1st DCA 1981). The question then, is whether the aggravating circumstance of HAC may be applied when Omelus did not personally murder the victim, but was the direct cause and motivation for the murder. This may be an issue of first impression which the state presents for the court's consideration. The state respectfully submits that since Omelus is responsible for all the acts of Jones under a principal theory, he should also be held responsible for the manner of death which he orchestrated.

POINT III ON CROSS APPEAL

THE TRIAL COURT SHOULD NOT HAVE INSTRUCTED THE JURY THAT IF THE PAROLE FUNCTION CEASES, OMELUS WOULD BE SENTENCED TO LIFE.

Defense counsel requested a special instruction which deleted the "25 years" parole provision regarding a life sentence (R1757-1763, 2025). The state took exception to there being an amendment of any sort to the standard jury instructions (R1765). Defense counsel argued that the instruction was appropriate because there was no parole anymore (R1758). The trial court made a finding that as of October 1, 1983, there is no parole function in the State of Florida for any crime (R1764). The trial court instructed the jury that if the jury recommended life, their recommendation would be life imprisonment "without possibility of parole for twenty-five years, or if the parole function ceases, for life" (R1926).

In Stewart v. State, 549 So.2d 171 (Fla. 1989), the argument that the sentencing guidelines eliminated parole for all crimes was rejected. This court reasoned that because capital felonies were specifically excluded from guidelines sentencing, parole remains a viable option for capital felons. This court concluded that parole eligibility was prohibited only for offenders sentenced pursuant to the guidelines.

The trial court should have followed the standard jury instruction which informs the jurors a defendant may be eligible for parole in twenty-five years. The standard jury instructions have been repeatedly upheld, and "a trial judge walks a fine

line indeed in deciding to depart." Kelley v. State, 486 So.2d 578, 584 (Fla. 1986).

POINT IV ON CROSS APPEAL

THE TRIAL COURT SHOULD HAVE ALLOWED TESTIMONY REGARDING OTHER MURDERS.

The trial court excluded testimony that Omelus had hired Jones to do several murders (R917-918). As discussed in Point I on cross appeal, this testimony was relevant to establish the relationship between Omelus and Jones and should have been allowed. Furthermore, the narrow question of whether Omelus hired Jones to commit other murders, i.e., hired him as a contract killer, was relevant standing alone. The trial court should have allowed the state to ask this very narrow question.

POINT V ON CROSS APPEAL

THE TRIAL COURT SHOULD NOT HAVE LIMITED THE TESTIMONY REGARDING THE "WEAPON".

The trial court limited testimony regarding procurement of a weapon. Although Omelus and Jones had gone looking for a gun, the weapon procured was a knife. The court ruled that the state could not refer to obtaining a "gun", but must refer to obtaining a "weapon" (R922-928). The court was concerned that by referring to a gun, the Indian River murder would be apparent. As argued in Point I on cross appeal, the trial court should have allowed the testimony regarding the Indian River murder. Even if the complete testimony were not allowed, the limited introduction of testimony regarding procurement of a gun should have been allowed. Omelus and Jones went to find a gun, which is what the testimony should have shown. There was absolutely no reason to re-phrase the testimony to "weapon", when they actually went to find a gun and that was the accurate testimony.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished by mail to Larry B. Henderson, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, counsel for the appellant, this 17 day of January, 1990.

Barbara C. Davis

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Of counsel